was right in holding that the application made by the Phaltan Bank is barred by limitation under art. 181. Mr. Madbhavi has strenuously contended that this view would be inequitable and would work hardship against the creditor. Mr. Madbhavi points out that if an appellant files an appeal and obtains time for paying court fees and ultimately fails to pay the court fees, the respondent it sometimes tempted not to make an application for a final decree and the default of the appellant ultimately works out to the prejudice of the respondent. In the present case, there is no doubt that the irregular manner in which this appeal has been dealt with by the High Court at Phaltan has resulted in prejudice to the appellant. But these considerations, in our opinion, have no relevance when we are dealing with a question of limitation. Besides, it was perfectly open to the appellant to have applied for a final decree in spite of the fact that the mortgagors had preferred an appeal. That is a step which any mortgagee-decree-holder should and can adopt to save his interest. If the appellant did not adopt this course, he cannot wholly blame the respondents for the present unfortunate result.

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Gajendragadkar J.

The appeal, therefore, fails and must be dismissed with costs.

Appeal dismissed.

M. W. P.

APPELLATE CIVIL

Before Mr. M. C. Chagla, Chief Justice and Mr. Justice Shah.

RATILAL PANACHAND GANDHI v. STATE OF BOMBAY.*

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Bombay Public Trusts Act (XXIX of 1950), ss. 6A, 6B, 18, 31, 32, 34, 35, 36, 37, 44, 47, 48, 50 (e), (g), 55, 56, 57, 58, 59 and 62 to 66—Bombay Public Trusts Rules, rr. 32 and 42†—Whether provisions of Act contravene any fundamental rights—Constitution of India, arts. 25,

* Civil Application No. 880 of 1952 with Mis. Application No. 212 of 1952.

† The relevant provisions of Rules 32 and 42 of the Bombay Public Trusts Rules are as follows:

32. (1) Every Public Trust shall pay annually to the Public Trusts Administration Fund on or before June 30, out of its property or funds a contribution at the rate of 2 per cent. of its gross annual income....

42. Charity commissioner shall not accept—

(*i*) any trust for religious purposes which involves the exercise by him as trustee of any religious observance or ceremony or the decision of any question as to the religious merit or character of any individual or institution....

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26, 199, 266, Seventh Schedule, List III, entries 10, 28, 47—Freedom of religion and freedom to manage religious affairs guaranteed by arts. 25 and 62—'Religion' in arts. 25 and 26, what constitutes—Whether provisions of Act dealing with administration of property belonging to religious denomination contravene art. 26 (b)—Whether provisions of Act levying contribution from the public trusts, beyond the competence of the State Legislature—Whether the said levy is a tax or a fee-Tests to determine whether levy is tax or fee.

The Bombay Public Trusts Act, 1950, does not contravene arts. 25 and 26 of the Constitution of India which guarantee the freedom of religion and the freedom to manage religious affairs.

The religious freedom which has been safeguarded by the Constitution is such religious freedom as may be enjoyed in a secular state. It is not every aspect of religion that has been safeguarded; nor has the Constitution provided that every religious activity shall not be interfered with. The word "Religion" as used in arts. 25 and 26 must be construed in its strict and etymological sense. Whatever binds a man to his Creator or his conscience and whatever moral and ethical principles regulate the lives of men, constitute 'religion' as understood in the Constitution. The secular activities of a religion—its secular aspects do not constitute 'religion' as understood by the Constitution.

The Bombay Public Trusts Act, 1950, is not a law dealing with religion; it deals with property and is concerned with the administration of property. The right to administer property which is guaranteed to a religious denomination or any section thereof under art. 26 (*d*) is not an unqualified right. The rights specified in art. 26 are subject to public order, morality and health; the right to religious freedom is qualified by the expression 'in accordance with law'. Therefore art. 26 clearly contemplates the right of the State to make laws with regard to the administration of property owned and acquired by religious denominations or any section thereof. So long as a religious denomination or any section thereof administers its property in accordance with such law that right alone is protected under art. 26 (*d*). Therefore, it is not open to a religious denomination or any section thereof to complain under art. 26 that its fundamental right has been interfered with by the Legislature by passing a law dealing with administration of property belonging to the religious denomination or any section thereof.

The Bombay Public Trusts Act, 1950, does not contravene art. 26, cl. (*b*) because what is safeguarded under that sub-clause is the right of a religious denomination to manage its own domestic affairs provided those affairs only refer to matters of religion. Where a religious denomination is managing its own affairs connected with property, it cannot be said that they are affairs in matters of religion. Views of a religious denomination in regard to property do not constitute a part of religion as understood by the Constitution.

Section 56 of the Act which gives power to the Court to apply the *cy-pres* doctrine does not contravene any fundamental right.

Section 44 of the Act under which the charity commissioner may be appointed as trustees does not contravene any fundamental right regarding religious practice in view of sub-s. (*4*), cl. (*e*) of the said section

which provides that the Court shall have regard to the custom and usage of the trust and especially in view of r. 42 framed under the Act.

The contribution which the public trusts have to pay to the Public Trusts Administration Fund under s. 58 of the Act does not constitute a tax but is a fee and therefore the State Legislature was competent to enact the provisions under entry 47 in List III of the Seventh Schedule to the Constitution.

In order to decide whether a levy is a tax, the real test is whether the levy is made for the purpose of raising public revenues; such levy when collected must form part of the public revenues of the State; it must be intended to be spent for Government purposes. Where the levy is imposed with an obligation on the Government to return a *quid pro quo*, it is not a tax; in other words the levy must not be for services rendered by the Government and to be utilised in connection with those services. It is not necessary that the services to be rendered by the State should be at the request of those who require those services. The very essence of the tax is that it could be used by Government for the whole public for any purpose connected with the administration of the State. A levy raised and earmarked for a specific purpose and made for services rendered, is a fee, not a tax.

Sri Shirur Mutt v. Commr. H. R. E. Board[1] and *Lower Mainland Dairy Products Sales Adjustment Committee* v. *Crystal Dairy, Ltd*,[2] distinguished.

Gadadhar Ramanuj Das v. *Province of Orissa*,[3] referred to.

Under s. 60 of the Act it is not open to the Government by a general or special order to divert the Public Trusts Administration Fund and apply it for general Governmental purposes. The general or special order which the Government may issue can only be within the ambit of s. 60. It may deal with the mode of the application of the fund, but that application itself cannot be altered and that application must be restricted to payment of charges for expenses incidental to the regulation of public trusts and generally for carrying into effect the provision of the Act.

In testing the validity of a Statute it is not proper to assume that those who are entrusted with carrying out the provisions of the Statute will act arbitrarily, capriciously and without regard for feelings of the people and the public. On the contrary it should be assumed that responsible officers act with responsibility and that the objects of the Act will be carried out in the spirit in which they were conceived by the Legislature. A provision must be held unconstitutional wherever there is a possibility of administrative or executive action contravening the fundamental rights of a citizen; but when the most important decisions which could be taken under the statute are not executive or administrative decisions but judicial ones, there is an ample safeguard against the possibility of any such contravention.

Application under art. 226 of the constitution.

[1] (1952) 1 M. L. J. 557. [2] (1933) A. C. 168.

[3] (1950) A. I. R. Orissa 47.

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One Ratilal (petitioner in Civil Application No. 880 of 1952) was the manager and trustee of a Jain Derasar which was a public temple open to all members of the Jain Swetamber Murtipujak Community. The Derasar was situated at Vejalpur in the Panch Mahals District. The properties belonging to teh Derasar consisted of the temple, a buidling, cash, ornaments for the idols and other moveables. These properties, worth about Rs. 5 lacs, were acquired by contributions from members of the Jain Swetamber Murtipujak Community residing all over India, from offerings and gifts made at the Derasar, from moneys realised for performance of religious ceremonies and from contributions made for specific purposes considered to be religious, pious and charitable according to the faith of the Jains. All the properties were utilized only for the maintenance and upkeep of the Derasar and the worship of the idols and for performance of different religious ceremonies and for the propagation of Jain faith and religion.

As the Derasar fell within the definition of a "public trust" as defined in the Bombay Public Trusts Act, 1950, the petitioner filed the present application submitting that the said Act and particularly ss. 18, 31, 32, 34, 35, 36, 37, 44, 47, 48, 50 (e) and (g), 55, 56, 57, 58, 59, and 62 to 66 of the Act and r. 32 of the Bombay Public Trusts Rules, were *ultra vires*, illegal, void, inoperative and of no effect.

The petitioner prayed, *inter alia*, for the issue of a writ in the nature of a mandamus, or a direction or order under art. 226 of the Constitution against the State of Bombay, the Charity Commissioner, Bombay, and the Assistant Charity Commissioner for Baroda region, ordering and directing them to forbear from enforcing the Act and the provision for registration of the said trust and from proceeding to recover the contribution in respect of the trust.

The petitioners in Miscellaneous Application No. 212 of 1952 were the trustees of certain funds and immoveable properties belonging to the Parsi Panchayat Funds and Properties in Bombay. The funds and properties were held in trust for the benefit of the Parsi community and for the purpose of carrying out several objects religious and charitable. The petitioner filed the present application submitting that the provisions of the Act interfered with the freedom of conscience of the public and with their right freely to profess practice and propagate religion

as well as with their right to manage their own affairs in matters of religion and to administer trust property.

Both the applications were heard together.

Civil Application No. 880 of 1952.

Sir Jamshedji Kanga, with *B. Somayya, S. T. Karani.*

N. A. Kapsi and *H. K. Shah,* for the petitioner.

M. P. Amin, Advocate General, with *G. N. Joshi,* with *Little & Co.* for the respondents.

Miscellaneous Application No. 212 of 1952.

Sir Jamshedji Kanga, with *H. D. Banaji,* for the petitioners.

M. P. Amin, Advocate General, with *G. N. Joshi,* for the respondents.

Chagla C. J. These two petitions before us challenge the constitutionality of certain provisions of Act XXIX of 1950 which is the Bombay Public Trusts Act. In the first petition the petitioner is a Swetamber Murtipujak Jain and a resident of Vejalpur in the Panch Mahals District and the petitioner is the Vahivatdar of a Jain Derasar situate in that place. In the second petition the petitioners are the Trustees of the Parsi Panchayat Funds. Both the petitions challenge the Act on more or less identical grounds. It would be perhaps better if we first deal with the petition presented by the Vahivatdar of the Jain Derasar. Before we do so it would be perhaps advisable to look at the object with which the Act was passed and its main provisions.

The Act was passed to regulate and to make better provision for the administration of public religious and charitable trusts in the State of Bombay. Chapter II of the Act sets up the establishment which consists of a Charity Commissioner and Deputy and Assistant Charity Commissioners. Chapter III deals with what are charitable purposes and it provides that public trusts will not be void on ground of uncertainty. Chapter IV deals with registration of public trusts. Chapter V deals with accounts and audits. Chapter VI deals with control and the control is to be exercised by a power of inspection and supervision conferred upon the officers and also by reports to be made by the auditor and the explanation to be obtained from the trustees on the report of the auditor. Chapter VII deals with the functions and powers of the Charity Commissioner.

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The Charity Commissioner is constituted a corporation sole, he is given the power to act as a trustee of public trusts, the consent of the Charity Commissioner is required for the institution of a suit in relation to a public charity corresponding to s. 92 of the Civil Procedure Code, and there is also provision for the application of the *cy-pres* doctrine which has been given a considerably extended form and shape. Then Chapter VIII deals with a special fund which is set up under the Act which is called the Public Trusts Administration Fund. Chapter IX deals with the appointment and qualification of assessors. Chapter X deals with offences and penalties. Chapter XI is procedural and deals with jurisdiction of Courts and appeals. And Chapter XII deals with miscellaneous matters.

Broadly speaking, certain provisions of the Act are challenged on the ground that they contravene two articles of the constitution and those two articles are Articles 25 and 26, and the contention on behalf of the Jain Derasar is that the properties of this Derasar are held in trust for a specific purpose and these properties are looked upon as Dev Dravya and can only be utilized for a specific purpose and that is for the temple and the idols belonging to the temple, and it is urged in the petition by the petitioner that it is an important and fundamental tenet of the Jain religion that when properties are held in trust for the specific purpose of being utilized for the temple and the idol, the properties or the income thereof cannot be diverted to any other purpose. The petitioner says that this is not a matter of usage or practice, but it is part and parcel of their faith and by enacting certain provisions of the Act the Legislature has interfered with their religion. The other objection, broadly speaking, taken to the provisions of the Act is that the Act makes it possible for a non-Jain to become a trustee of a Jain Derasar, and again it is urged that it is contrary to the tenets of the Jain religion for any non-Jain to be a trustee of a Derasar or a non-Jain to be associated in the administration of a Derasar. I shall presently examine the specific sections which are challenged, but before I do that it is necessary to look at Articles 25 and 26 and to consider what these Articles provide and what fundamental right they safeguard.

It may be said that both Articles 25 and 26 deal with religious freedom, but as I shall presently point out religious freedom as contemplated by our Constitution is not an unrestricted freedom. The religious freedom which has been safeguarded by the Constitution is religious freedom which must be

envisaged in the context of a secular State. It is not every aspect of religion that has been safeguarded, nor has the Constitution provided that every religious activity cannot be interfered with. "Religion" as used in arts. 25 and 26 must be construed in its strict and etymological sense. Religion is that which binds a man with his Creator, but Mr. Sommayya on behalf of his client says that as far as Jains are concerned they do not believe in a Creator and that distinction would not apply to the Jains. But even where you have a religion which does not believe in a Creator, every religion must believe in a conscience and it must believe in ethical and moral precepts. Therefore whatever binds a man to his own conscience and whatever moral and ethical principles regulate the lives of men, that alone can constitute religion as understood in the Constitution. A religion may have many secular activities, it may have secular aspects, but these secular activities and aspects do not constitute religion as understood by the Constitution. There are religions which bring under their own cloak every human activity. There is nothing which a man can do, whether in the way of clothes or food or drink, which is not considered a religious activity. But it would be absurd to suggest that a Constitution for a secular State ever intended that every human and mundane activity was to be protected under the guise of religion, and it is therefore in interpreting religion in that strict sense that we must approach arts. 25 and 26. Article 25 protects religious freedom as far as individuals are concerned. The right is not only given to the citizens of India but to all persons, and the right is to profess, practice and propagate religion. But here again the right is not an unrestricted right. It is a right subject to public order, morality and health, and further it permits the State to make any law regulating or restricting any economic, financial, political or other secular activity although it may be associated with religious practice, and there is a further right given to the State and that is that the State can legislate for social welfare and reform even though in doing so it may interfere with the profession, practice and propagation of religion by an individual. When we turn to Article 26, it does not deal with the rights of an individual or of a citizen. It deals with the right of a religious denomination or a section of a religious denomination. Therefore what Article 26 does is to protect and safeguard collective rights in contradistinction to individual rights safeguarded by Article 25 and the rights that are safeguarded

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are to be found in sub-cl. (*a*), (*b*), (*c*) and (*d*). Mr. Sommayya's contention is that the present case falls under sub-cl. (*b*) and the legislation is an attempt at interfering with the right of the Jains to manage its own affairs in matters of religion. I am not at all sure that reading the petition as a whole it is a petition on behalf of a religious denomination or any section thereof. The very fact that the petitioner is at pains to point out what the religious tenets of Jains are goes to show that reliance is placed more on art. 25 than on art. 26, and the grievance of the petitioner is not so much on behalf of any denomination or any section thereof but rather on behalf of every Jain and the grievance is that the right of every Jain to profess and practice his religion has been interfered with. But even assuming that art. 26 applies and that the petitioner is before us on behalf either of the Jain community as a whole or of that particular section in Vejalpur which is interested in the management of the Derasar situated there, the question is what is the proper interpretation that we must place on art. 26. It will be noticed that sub-cl. (*c*) of art. 26 gives the right to a religious denomination or any section thereof to own and acquire moveable and immoveable property and sub-cl. (*d*) provides that it has the right to administer such property in accordance with law. Therefore the right to administer property given to a religious denomination or any section thereof is not an unqualified right. Apart from all the rights in Article 26 being subject to public order, morality and health, as far as this particular right is concerned that right is qualified by the expression 'in accordance with law." Therefore, this right clearly contemplates the right of the State to make laws with regard to the administration of property owned and acquired by religious denominations or any section thereof. All that is protected is that so long as a religious denomination or any section thereof administers its property in accordance with such law as the State Legislature has passed, that right should not be interfered with. Therefore it is not open to a religious denomination or any section thereof under Article 26 to complain that its fundamental right has been interfered with if the Legislature were to pass a law dealing with administration of the property belonging to the religious denomination or any section thereof, and in my opinion there can be no doubt that the substance of the law with which we are dealing is not a law dealing with religion but it deals with property and it is concerned with the administration of property. In my opinion

the case cannot fall under sub-cl. (*b*) because what is safeguarded under that sub-clause is the right of a religious denomination to manage its own domestic affairs provided those affairs only refer to matters of religion. What was obviously contemplated was that when a religious denomination is dealing with things like dogmas, things like religious ceremonies, things like matters concerning its own day to day affairs, the State should not interfere with those matters. But when you have a case where the religious denomination is managing its own affairs connected with property, it cannot be said that those are affairs in matters of religion unless we accept the extended meaning that Mr. Somayya wants to give to the expression "religion." Any views that a religious congregation or a religious denomination may hold with regard to property cannot constitute those views a part of religion as understood by the Constitution. The whole of Mr. Sommayya's case is that, because the Jains think that certain religious efficacy or certain religious qualities attach to certain property the State cannot deal with that property. The answer to that is that although in its wide sense it may be part of Jain religion, in the constitutional sense it is not a part of religion but it is a part of the secular aspect of religion, and it has something to do with administration of property which the Constitution has not safeguarded and with regard to which the Legislature is perfectly competent to legislate.

Now, the sections challenged by the petitioner are ss. 18, 31, 32, 34, 35, 36, 37, 44, 47, 48, 50 (*e*) & (*g*), 55, 56, 57, 58, 59 and 62 to 66. But Mr. Sommayya has very properly grouped these under various heads and has challenged them on certain principles and so it is not necessary to examine or scrutinize each section separately. The first attack made by Mr. Sommayya is against the sections which have extended the *cy-pres* doctrine. The *cy-pres* doctrine is by no means a new doctrine. It was well known in England and the Courts of Equity and our Courts also administering equity have applied to trusts coming up before them this particular doctrine. But the objection of Mr. Sommayya is to the extension of that doctrine and according to him that extension results in the Jain religion being interfered with. Section 55 provides that if at any time the Charity Commissioner is of opinion that the original object for which the public trust was created has failed, or the income or any surplus balance of any public trust has not been utilized or is not likely to be utilized, or it is not in public interest expedient, practicable, desirable, necessary or proper to

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carry out wholly or partially the original intention of the author of the public trust or the object for which the public trust was created and that the property or the income of the public trust or any portion thereof should be applied to any other charitable or religious object, then the power is given to the Charity Commissioner to ask the trustees to apply to the Court or failing them to apply to the Court himself; and under s. 56 the power is given to the Court to dispose of the application and to decide whether the trust should be administered by this extended *cy-pres* doctrine. What is pointed out is that the power of the Court is so wide that the Court in giving the directions may consider what is expedient, practicable, desirable or necessary in public interest and that the Court may apply the property or the income of the public trust to any other charitable or religious object, and the apprehension that the Jains feel is that the property or income of this Derasar, which according to the Jain religion can only be applied to the specific purposes already mentioned, may under this extended *cy-pres* doctrine be applied to some other charitable or religious object. It will be noticed that it is not by an administrative order or an executive fiat that the object of the trust can be altered. The greatest safeguard that is vouchsafed to the subject is the judicial safeguard and it is only a Court of law, after a judicial inquiry and coming to a judicial decision, that can apply this extended *cy-pres* doctrine and in doing so it must in the first place, as far as possible, give effect to the original intention of the author of the public trust or the object for which the public trust was created. It is only when the Court comes to the conclusion that the intention or object is not wholly or partially expedient, practicable, desirable or necessary in public interest that the Court may direct that the property or income of the public trust or any portion thereof be applied *cy-pres* to any other charitable or religious object. It is difficult to see how a judicial decision that a particular trust should be administered *cy-pres* can contravene any fundamental right of the petitioner.

We might briefly look at the other sections which have been challenged in this petition. Section 18 deals with the registration of public trusts and it makes it obligatory upon the trustee of every public trust to which the Act has been applied to make an application for the registration of the trust of which he is a trustee. Section 31 is a bar to suits and it provides

that no suit to enforce a right on behalf of the public trust which has not been registered under this Act shall be heard or decided in any Court. This is a further compulsion upon the trustees of public charitable trusts to get themselves registered. Section 32 makes it obligatory upon the trustees of public trusts which have been registered to maintain regular accounts. Section 34 casts the duty upon every auditor auditing the accounts of a public trust to prepare a balance sheet and income and expenditure account and to forward a copy of the same to the officers under the Act, and it is also the duty of the auditor to specify in this report all cases of irregular illegal or improper expenditure and other contraventions against the Act or against the administration of the trust. Section 35 provides for the investment of public trust money. Section 36 deals with alienation of immoveable property and it permits alienation only with the previous sanction of the Charity Commissioner. Section 37 provides that the Charity Commissioner and the other officers shall have power to enter on and inspect or cause to be entered on and inspected any property belonging to a public trust, and it also deals with other powers of these officers of inspection and supervision. Sections 44 and 47 deal with appointment of Charity Commissioner as a trustee of a public trust and the objection to these sections is that it makes possible the association of a non-Jain with the administration of a Jain religious trust. I have dealt with these sections in detail later. Section 48 provides for levy of administrative charges in cases where the Charity Commissioner is appointed a trustee. Section 50 takes the place of s. 92 of the Civil Procedure Code, and the two sub-sections challenged are sub-ss. (*e*) and (*g*). Sub-s. (*e*) provides that the Court may grant a relief with regard to a declaration as to what proportion of the trust property or of the interest therein shall be allocated to any particular object of the trust, and sub-s. (*g*) provides that one of the reliefs which may be asked for in a suit under s. 50 is for the settlement of a scheme or variations or alterations in the scheme already settled. Sections 62 to 65 deal with assessors. Sub-s. (*3*) of s. 62 provides that in preparation of the lists, regard shall be had to the property, character, education and religion of persons whose names are entered in the list of assessors. Section 65 provides that in any inquiry relating to a public trust which is for the benefit of the members belonging to a particular religious denomination, the

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assessors chosen shall, as far as may be practicable, belong to the said religious denomination. Section 66 is the penal section.

Now, when one looks at all these sections which are challenged, it will be clear that these sections deal with the administration of public trusts. The object of providing these sections is to see that public religious and charitable trusts in the State of Bombay are administered in the interest of the beneficiaries and in public interest because the public is interested in the administration of these trusts. If what I have said about the meaning to be given to the expression "religion" in arts. 25 and 26 is correct, then these provisions cannot be attacked as contravening any fundamental right of the petitioner. In my opinion these provisions have nothing whatever to do with religion. Properties settled on trust make it possible for certain religious objects to be achieved and it may be that those objects may be very near and dear to the hearts of those belonging to a particular religion. But it is one thing to say that you are dealing with the administration of the property, and it is entirely a different thing to say that you are interfering with the objects which the property helps to carry out. There is no attempt at interfering with the religious purposes or religious objects. The whole attempt and the whole object is to see that the properties settled on public and charitable trusts are properly managed and are properly administered, that the trustees keep proper accounts, that the trustees render those accounts, answer questions put to them arising out of those accounts, and every single provision contained in the Act is incorporated from that point of view. Therefore, to the extent that the Act is challenged on the ground that it contravenes arts. 25 and 26 of the Constitution, the petition must fail.

I now come to the other head of the challenge which is much stronger, and that is that the Legislature was not competent to enact certain provisions of the Act which deal with the levying of a fee upon various public trusts, and the sections dealing with this are s. 57 to start with. That section provides for the establishment of a fund to be called the Public Trusts Administration Fund, and that fund is to be vested in the Charity Commissioner, and sub-s. (2) provides for the sums that are to be credited to that fund. Section 58 provides that every public trust shall pay to the Public Trusts Administration Fund

annually such contribution on such date and in such manner as may be prescribed, and now under the rules framed the contribution fixed is 2 per cent. upon the gross annual income of every public trust. Certain trusts are exempted in favour of education and medical relief. Section 60 provides that the public trust administration fund shall, subject to the provisions of this Act and subject to the general or special order of the State Government, be applicable to the payment of charges for expenses incidental to the regulation of public trusts and generally for carrying into effect the provisions of this Act. In this connection two other sections may be looked at. One is s. 6A which provides that the officers under the Act shall be servants of the State Government and they shall draw their pay and allowances from the consolidated Fund of the State; and s. 6B which provides that there shall be paid every year out of the Public Trusts Administration Fund to the State Government such costs as the State Government may determine on account of the pay, pension, leave and other allowances of the officers appointed under the Act.

Now the interesting and important question that arises for our determination is whether the contribution to be paid by every public trust under s. 58 constitutes a fee or a tax. The competency of the Legislature to enact these provisions depends upon the contribution being a fee. If it is a tax then undoubtedly the Legislature would not be competent to enact these provisions. The position under the Constitution is that this particular legislation falls under three entries in List III of the 7th Schedule to the Constitution, viz. entry 10 which deals with trust and trustees, entry 28 which deals with charities and charitable institutions, charitable and religious endowments and religious institutions, and entry 47 which deals with fees in respect of any of the matters in this list, but not including fees taken in any Court. It is only if the contribution under the Act is a fee that the State Legislature would be competent to legislate with regard to it, as entry 47 falls in the Concurrent list and power is given both to the Union Legislature and the State Legislature to legislate with regard to items falling in that list. If the contribution, on the other hand, is a tax, then this particular tax is not expressly provided under any of the entries in the three lists, but both by reason of art. 248 (*1*) and by reason of entry 97 in list I the power to legislate with regard to this tax would be in the Union Legislature and not in the State Legislature. Before we decide whether this particular contribution is a tax or a fee we must try

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and understand clearly what is the difference between a tax and a fee. In some Constitutions no distinction is drawn between a tax and a fee. Tax is used in its wider concept and includes a fee. But as far as our Constitution is concerned a clear distinction is drawn between a tax and a fee. The very fact that the power is given to the State Legislature to impose a fee and the power to impose a tax is given to the Union Legislature itself shows that the Constitution has recognised a distinction between these two different impositions. Mr. Sommayya says that the first and the most essential feature of a tax is that it is a compulsory levy, and that the element of compulsion is the most important element in a tax. According to him there can never be a compulsion in the case of a fee. A fee is something voluntary which a person pays if he wants certain services to be rendered to him in return for the fee he pays, and the instances given are of instances where licenses are taken out for various things on payment of a fee, and the contention is that there is no obligation upon a citizen to take out a license. If he wants a license, which is his choice, then only he has got to pay a fee. But what is pointed out in this case is that there is a compulsion upon every public charitable and religious trust to register itself and to pay the contribution fixed by the Government. It is then pointed out that another feature of a tax is that the levy is not commensurate with the services rendered; that there is no relationship between what the subject pays and the services that the State renders to him. Here again it is pointed out that under this Act a uniform levy is made upon all public trusts. No distinction is made between one trust and another and no question arises as to what services are rendered to one trust or another. It is further pointed out that the levy is not uniform but depends upon the capacity of each trust to pay. The payment is upon the annual gross income of the trust; it is not a fixed amount which each trust has to pay irrespective of its income and irrespective of its capacity to pay; and Mr. Sommayya says that these are all features of a tax and not of a fee. In my opinion, and as I shall presently point out, the authorities are clear on this subject, the real test to be applied in order to decide whether a certain levy is a tax or not is to consider whether the levy is made for the purposes of raising public revenues. The levy when collected must form part of the public revenues of the State; it must be intended to

be spent for Governmental purposes. As we have said as long ago as the time of Adam Smith, there must not be any suggestion in imposing the levy of the Government returning *quid pro quo;* in other words, the levy must not be for services rendered by Government and to be utilized in connection with those services. If a section of the public pays a certain levy and if that levy does not form part of the public revenues and if that levy is utilized by Government in connection with the services that the Government is to render to that section in respect of the levy paid by it, then it is not a tax because it does not form part of the public revenues nor is it used for the whole public or for Governmental purposes. The very essence of a tax is that it could be used by Government for the whole public for any purpose connected with the administration of the State. But when you have a levy raised for a specific purpose, when you have that levy earmarked for a specific purpose and when that levy is taken for services rendered, then that levy is not a tax but a fee. It is argued that it is only when services are required by a section of the public that charging that section of the public for services to be given to it by Government would constitute a fee, and it is pointed out that in this case there is no question of the trustees wanting these services from Government. It is said that these services are thrust upon them, whether they like it or not. But, as I shall presently point out, it is no longer now necessary that the services to be rendered by the State should be at the request of those who require those services. The whole concept of the State has changed today. There was a time when it was thought that the function of the State was to preserve law and order, and everything else was based upon the principle of *laissez faire.* Today the State is a welfare State and its functions are more varied than they ever were in the past and there are innumerable instances where the State feels called upon to render services, whether there is a demand for those services or not. The State considers the welfare of the public or a section of the public and from that point of view decides that it is necessary that certain services should be rendered.

Now, when we turn to the Act itself, it is clear that the contribution to be paid under s. 58 annually by the public trusts registered under the Act does not form part of the general revenues of the State. Section 57, as pointed out, establishes a special fund called the Public Trusts Administration Fund,

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and the fund is vested in the Charity Commissioner and every contribution made by registered public trusts form part of this fund. The purpose for which this fund is to be used and utilized is to be found in s. 60 and that purpose is the payment of charges for expenses incidental to the regulation of public trusts and generally for carrying into effect the provisions of the Act. It is pointed out that this is subject to the provisions of the Act and subject to the general or special order of the State Government, and it is argued that under this section it would be open to the Government by a general or special order to divert this fund and apply it for general Governmental purposes. In my opinion s. 60 does not lend itself to that interpretation. The general or special order which the State Government may issue can only be within the ambit of s. 60. It may deal with the mode of application of the fund, but the application itself cannot be altered and that application must be restricted to payment of charges for expenses incidental to the regulation of public trusts and generally for carrying into effect the provisions of the Act. If the State Government were to utilize any part of this fund for any purpose which was not within the statute, then the State Government would be guilty of misuse of public funds. Then emphasis is placed upon ss. 6A and 6B and it is pointed out that under s. 6A the salary of the officers appointed under the Act is charged upon the Consolidated Fund of the State and therefore it is really the general revenues of the State which are paying for the services to be rendered by these officers. But s. 6B makes it clear that all the moneys that the Government pay to the officers and which are charged upon the Consolidated Fund are to be reimbursed by the Public Trusts Administration Fund. Therefore in effect and in substance it is the Public Trusts Administration Fund which is paying these officers for the services rendered. Therefore the provisions of the Act make it amply clear that the contributions made are earmarked for a particular purpose, that they do not form part of the Consolidated Fund of the State, and that the Fund created is to be applied for carrying out the provisions of the Act. It may be pointed out that under our Constitution there is a provision for a Consolidated Fund which consists of all the revenues raised by Government. Article 266 provides that all revenues received by the Government of a State and all loans raised by that Government by the issue of treasury bills, loans or ways

and means advances and all moneys received by that Government in repayment of loans shall form one consolidated fund to be entitled "the Consolidated Fund of the State," and sub-cl. (3) of that Article provides that no moneys out of the Consolidated Fund of a State shall be appropriated except in accordance with law and for the purposes and in the manner provided in the Constitution. It is only taxes raised and revenues raised for Governmental purposes that form part of this Fund. But when moneys are received as a result of fees imposed for a specific purpose and when the fund collected is earmarked and set apart, such a fund does not form part of the Consolidated Fund contemplated under art. 266 and it is clear that the fund created under s. 57, viz. the Public Trusts Administration Fund, is not a part of the Consolidated Fund of the State. It is also interesting to refer to art. 199 of the Constitution which deals with money bills. Certain procedure has got to be followed with regard to money bills and Article 199 defines what a money bill is, but when we turn to sub-cl. (2) it provides that a bill shall not be deemed to be a money bill by reason only that it provides for the imposition of fines or other pecuniary penalties or for the demand or payment of fees for licenses or fees for services rendered, or by reason that it provides for the imposition, abolition, remission, alteration or regulation of any tax by any local authority or body for local purposes. Therefore in the eye of the Constitution fees either for licenses or for services rendered are not taxes or revenues which are regulated by money bills. It is important to note that sub-cl. (2) of art. 199 speaks both of fees for licenses and fees for services rendered. The first category may deal with cases where there is a voluntary application for a license and there is no compulsion to take out a license. The second category may include not only services rendered at the request of a section of the public, but even services rendered compulsorily by the State in the interest of the public.

Very strong reliance has been placed by Mr. Sommayya on a judgment of the Madras High Court in *Sri Shirur Mutt* v. *Commissioner, Hindu Religious Endowments Board.*[1] A Bench of the Madras High Court consisting of Mr. Justice Satyanarayana Rao and Mr. Justice Rajagopalan were considering the provisions of the Hindu Religious Endowments Act, Madras. Under that Act too there was a provision for a levy of 5 per

[1] (1952) 1 M. L. J. 557.

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cent. of the income of a religious institution, and the question that the Bench had to consider, among other questions, was whether this levy constituted a tax or a fee, and the Madras High Court came to the conclusion that it was a tax and not a fee and the Madras State Legislature was not competent to enact the provision with regard to the imposition of the tax. In considering this question the learned Judges have cited with approval the definition of Professor Bastable of what a tax is and Professor Bastable's definition is: "A tax is a compulsory contribution of the wealth of a person or body of persons for the services of the public powers," and Mr. Somayya emphasises the fact that it is a compulsory contribution which goes to make a levy a tax. In my opinion—and that is borne out by the other authorities to which I shall presently refer—it is not so much the element of compulsion which is emphasised by Professor Bastable; it is rather the fact that the contribution is for the services of the public powers, not for any specific purpose but for public powers at large; and the learned Judges do emphasise the fact that this particular levy made by the Madras Government was a compulsory contribution, that it was a uniform contribution, that the services of the Government and the officers did not bear a direct relation to the levy imposed; but they do point out that neither the compulsory nature of the levy nor the uniformity of the levy does not by itself or even cumulatively help in deciding the question whether the contribution is a tax or is only a fee, and when we look further on in the judgment it is clear that the view taken by the learned Judges was that the levy imposed by this Act would form part of the Consolidated Fund and the payment of salaries to the officers and others would have to be made out of that Fund of the State under a specific Appropriation Act, and but for such an Appropriation Act no amount could be paid out of the moneys collected under this Act. Therefore the main distinguishing feature of the Madras Act which the Madras High Court was considering and the Act which we have to consider is that under the Madras Act no separate fund was constituted of the levy imposed by the Government and contributions went to the Consolidated Fund and not to any specific fund specially created. Further, all the expenses had to be met by a proper Appropriation Act and not out of the specific fund as provided by the statute itself. Whereas under our Act the position is entirely different. As

already pointed out, we have here a special fund earmarked for a special purpose with a direction that all expenses for carrying out the statute have to be met out of this fund. Therefore in my opinion it is not correct to say that this decision is an authority for the proposition for which Mr. Somayya contends, viz. that as soon as we find that there is an element of compulsion in the payment of the fee, as soon as we find that the fee is not uniform and that the fee is not comensurate with the services rendered, we must hold that the fee is a tax.

There is another judgment which is also a very helpful decision on this point, and that is the judgment of the Orissa High Court in *Gadadhar Ramanuj Das* v. *Province of Orissa.*[1] The learned Judges there, Mr. Justice Das and Mr. Justice Narasimham, were considering the provisions of the Orissa Hindu Religious Endowments Act (IV of 1939) and they had also to consider whether a levy imposed under that Act was a tax or a fee, and the learned Judges quote with approval a passage from Findley Shirras in his Science of Public Finance, and the learned author states:

> "Taxes are compulsory contributions to public authorities to meet the general expenses of Government which have been incurred for the public good and without reference to special benefits. Fees are payments primarily in the public interest for special services which people must accept whether willingly or not;.....Fees are for governmental services, while prices are for services of a business character. They differ also from taxes in that they are payments for special benefits enjoyed by the payer, while taxes are for general benefits, expenses which are laid, as Adam Smith says, 'for the benefit of the whole society.' The essence of a tax is the absence of *quid pro quo* between the tax payer and the public authority."

Therefore according to this author the test which must be applied is whether there is a *quid pro quo* between the tax payer and a public authority, or, in other words, whether by paying the levy the payer gets a special benefit or a general benefit. There can be no doubt that in this case there is definitely a *quid pro quo* between the public trusts which make the contributions and the State which renders these public trusts the services as defined by the Act. Therefore the public trusts under the Act do not make this contribution for any general benefit which the whole public receives; they make the contribution for the special benefit provided for them under the statute. Halsbury, 2nd edition, Vol. 24 at p. 366 also states the law in the following terms:

[1] [1950] A. I. R. Orissa 47.

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"Such fees are imposed in respect of benefit taken or service rendered under the Act and in order to the execution of the Act, and are not made payable into the Treasury or Exchequer or in aid of the public revenue and do not form the ground of public accounting."

It was on the application of this test that the High Court of Orissa came to the conclusion that the particular levy imposed by the Act they were considering was a fee and not a tax.

Mr. Somayya has strongly relied on a judgment of the Privy Council in *Lower Mainland Dairy Products Sales Adjustment Committee* v. *Crystal Dairy, Ltd.*[1] A Committee was set up by the Lieutenant Governor of British Columbia in order to bring about an adjustment between milk sold in fluid form and the products of the milk sold in the market. The Committee was set up because the market for fluid milk had become glutted and there was shortage of dairy products, and the Committee was given the power to impose a levy on the sellers of fluid milk and to pay it to the producers of dairy products as a sort of a substitute, and the Committee was also given the power to impose a levy to meet the expenses of the Committee, and the question was whether these two levies imposed by the Committee were taxes or not, and the Privy Council held that they were taxes, and they point out at p. 175 that these levies are compulsorily imposed by a statutory Committee consisting of three members; that they are enforceable by law. They further point out that the fact that the moneys so recovered are distributed as a bonus among the traders in the manufactured products market does not affect the taxing character of the levies made; and what Mr. Somayya says is that the Privy Council had a case similar to the one we have before us where a levy was made from a section of the public for a specific purpose and yet the Privy Council held that it was a tax because it emphasised the compulsory nature of the levy. It must be borne in mind that the Privy Council was not considering in this decision the distinction between a fee and a tax and there was no reason why the Privy Council should consider that distinction because under the British North America Act no distinction is made between fees and taxes. The scheme of the British North America Act is somewhat similar to our own Constitution. That Act also has lists which provides for subjects on which the Provincial Legislature can legislate and subjects on which the Dominion Legislature can legislate. But in demarcating the subjects the British North

[1] [1933] A. C 168

America Act has not made any distinction between taxes and fees. On this point the scheme of our Constitution is different and therefore the only question that fell to be considered by the Privy Council was whether it was a tax within the meaning of the British North America Act. If it was a tax certain legal consequences followed; if it was not, different consequences followed. Therefore, this authority cannot be relied upon for contending that the Privy Council defined what was tax in contradiction to what is a fee.

Turning to the American Constitution, Willis in his well known book of American Constitutional Law at p. 371 defines "taxation" as follows:

> "Taxation is the legal capacity of a government to impose charges upon persons or their property to raise revenue for governmental purposes."

It is not sufficient that Government should raise a revenue. What is more important is that the revenue raised must be for governmental purposes. Undoubtedly under the present Act, Government in a sense is raising a revenue, it is imposing a levy, it is collecting a contribution from a section of the public, but all that is done not for governmental purposes but for a limited specific purpose laid down in the Act itself.

Therefore on a consideration of these authorities I am of the opinion that the contribution which has got to be made by public trusts which are registered under the Act do not constitute a tax but is a fee, and therefore the State Legislature was competent to enact these provisions under entry 47 in List III of the 7th Schedule to the Constitution.

Sir Jamshedji has, with his usual vigour, reinforced the arguments advanced by Mr. Somayya on behalf of the Parsi Panchayat, and the main burden of his song is not so much what Mr. Somayya feels about the special fund created for the application of it to temple and idol, but he says there is interference which this Act constitutes with the actual practice of religion by Parsis. Sir Jamshedji says that he is not concerned with the administration of property, but his clients are agitated by the possibility that under this Act a serious encroachment might be made upon the Parsi Zoroastrian religion. In my opinion the apprehension felt by Sir Jamshedji is entirely unjustified. It is first pointed out that under s. 37 of the Act power is given to the Charity Commissioner and the other officers to enter on and inspect or cause to be entered on and inspected any

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property belonging to a public trust, and Sir Jamshedji says that it is part of the Parsi Zoroastrian religion not to permit any non-Zoroastrian to enter their Agiaries, Ateshbehrams and Dokhmas. According to Sir Jamshedji it is sufficient if even the eyes of a non-believer were to fall upon a sacred fire in Agiaries and Ateshbehrams for the complete desecration of that particular charity, and Sir Jamshedji says that there we have a provision in the law by which the officers appointed under the Act can enter the Fire Temple of the Parsis in order to inspect it and to see whether it is being run in the interest of the public trusts. In putting forward this contention Sir Jamshedji is overlooking the proviso to that section and that proviso is that in entering upon any property belonging to the public trust the officers making the entry shall give reasonable notice to the trustee and shall have due regard to the religious practices or usages of the trust. I am sure that the Charity Commissioner and the officers working under him know what the religious feeling of the Parsi community is, and it is inconceivable that the Charity Commissioner or any of his officers would think of entering a Fire Temple of the Parsis if the community of the Charity Commissioner or his officers happens to be other than the Parsi community.

Then it is pointed out that under s. 44 of the Act the Charity Commissioner may be appointed to act as a trustee of a public trust by a Court of competent jurisdiction or by the author of the trust and sub-s. (2) provides that the Charity Commissioner acting as a trustee of the public trust shall have the same powers, duties and liabilities, and be entitled to the same rights and privileges as any other trustee of a public trust, and Sir Jamshedji says that if the Charity Commissioner, who may not be a Parsi, is appointed a trustee under this provision he would have the right to visit the Fire Temple and to administer the trust in the same way as a Parsi trustee would be administering. Sub-section (4) of this section further provides that the Charity Commissioner shall be the sole trustee and it shall not be lawful to appoint him as a trustee along with other persons. I do not think that Sir Jamshedji could have any grievance if the author of a Parsi trust were to appoint the Charity Commissioner as a trustee. That seems to be rather an unlikely event. Failing that, it is only a Court that can appoint a Charity Commissioner as a trustee of a public charitable and religious trust, and the power of the Court to

appoint such a trustee is to be found in s. 47, and under sub-s. (3) the Court is given the power to appoint the Charity Commissioner or any other person as the trustee to fill up the vacancy after making an inquiry, and sub-s. (4) provides that

"In appointing the trustee under sub-s. (3) the Court shall have reard—

(a) to the wishes of the author of the trust;

(b) to the wishes of the person, if any, empowered to appoint a new trustee;

(c) to the question whether the appointment will promote or impede the execution of the trust;

(d) to the interest of the public or the section of the public who have interest in the trust; and

(e) to the custom and usage of the trust."

Now, it is impossible to believe that any Court, knowing the tenets of the Zoroastrian religion, would appoint the Charity Commissioner a trustee when that would involve his having to visit Fire Temples and to interfere with Parsi religious ceremonies. The Court has to take into consideration the custom and usage of the trust and also the interest of the public or the section of the public which is interested in the trust, and I do not understand how the interest of the Parsi community can be safeguarded if the Court was to wound its religious susceptibilities by appointing a non-Parsi as a trustee. The intention of the Government in this matter is made amply clear by r. 42 which they have enacted under their rule making power, and that rule provides that the Charity Commissioner shall not accept any trust for religious purposes which involves the exercise by him as trustee of any religious observance or ceremony or the decision of any questions as to the religious merit or character of any individual or institution.

Sir Jamshedji has also emphasised the wide powers given to the Court under s. 56 with regard to the application of the *cy-pres* doctrine. Sir Jamshedji says that it is a part of the Parsi Zoroastrian religion that if you have a Fire Temple or a Dokhama, they must be continued and they cannot be shut up in order that the funds settled in trust for their maintenance should be applied for some more worthy object, and Sir Jamshedji says that the powers given to the Court under s. 56 are so wide that it is quite possible that the Court may take the view that rather than having Agiaries and Dokhmas it is much better for the Parsis to spend the money on education or medical relief, and Sir Jamshedji emphasises the expression used in s. 56 that if the Court thinks it is desirable not to carry out

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the intention or object of the trust wholly or partially, then the Court may direct that the property or income of the trust or any portion thereof should be applied *cy-pres* to any other charitable or religious object, and Sir Jamshedji says that there is no knowing what the Court at a particular time or under particular circumstances may or may not think desirable. Again, it is difficult to understand how any Court acting judicially, not arbitrarily or capriciously, can ever think it desirable to do something when the doing of that is likely to injure and wound the religious susceptibilities of that very section of the public for which the trust was intended. We are not dealing with executive or administrative orders or fiats; we are dealing with Courts and Judges; and I have no doubt that Sir Jamshedji has every confidence in Judges and Courts and he realises that Courts and Judges act on judicial principles and not out of a consideration which might be purely personal or which might be based on prejudices or predilections. The Parsi community should realise that the best and the finest safeguard that this statute has given to them is the safeguard that an order with regard to the application of the *cy-pres* doctrine can only be made by a Court judicially and not by an administrative or an executive order.

Then Sir Jamshedji also takes exception to the fact that it is possible that non-Parsi assessors might be appointed under Chapter IX and as such assessors they may have the power to visit Parsi Fire Temples. Here again, as I have already pointed out, under s. 65 (*1*) the statute provides that in any inquiry relating to a public trust which is for the benefit of the members belonging to a particular religious denomination, the assessors chosen shall, as far as may be practicable, belong to the said religious denomination. In testing the validity of a statute it is not proper to assume that those who are entrusted with carrying out the provisions of that statute will act arbitrarily, capriciously and without regard for the feelings of people and the public. On the contrary, the approach should be that responsible officers act with responsibility and that the objects of the Act will be carried out in the spirit in which they were conceived by the Legislature. It is true, as has been laid down by the Supreme Court, that if we find that even if there is a possibility of administrative or executive action which may contravene the fundamental rights of a citizen, we must hold such provision unconstitutional. But as far as this Act is

concerned, most of the important decisions which can be taken under it are not executive or administrative decisions but judicial decisions, and as I said before, the criticism that may apply to executive or administrative action cannot possibly apply to the decision of a competent Court.

The result therefore is that we must hold the impugned provisions of the Act to be valid. In my opinion no provision of the Act contravenes the fundamental rights embodied in Part III of the Constitution, nor is any provision of this Act beyond the competence of the State Legislature. The result is that the petitions fail and must be dismissed.

Shah J. I agree.

Bombay Act XXIX of 1950 was passed by the Bombay Legislature, as the preamble states, to regulate and make better provision for the administration of public religious and charitable trusts in the State of Bombay. That the Legislative Assembly of the State of Bombay had authority to pass an Act for the regulation and for making better provision for the administration of public religious and charitable trusts is not denied and cannot be denied, in view of the entries in List III, viz., entries 10 and 28, of the 7th Schedule to the Constitution of India. But it has been strenuously argued before us, that even though it may be within the competence of the Legislature of the State of Bombay to pass an Act for making better provision for the administration of public religious and charitable trusts, it was not open to the Legislature to enact various provisions which affect matters of religion within the meaning of art. 26 of the Constitution and to enact provisions which affect the free profession and practice of religion within the meaning of art. 25 by persons residing within the territory of India. It has also been contended that the provision made for levy of contribution from the trusts which are operating or which have property within the State, is a provision for levying a tax within meaning of art. 266 of the Constitution, and was not within the competence of the State Legislature and, therefore, the levy of the contribution must in law be regarded as unauthorized. Counsel appearing in both the cases have in the course of the argument challenged the validity of a large number of sections of Act XXIX of 1950. The arguments which have been advanced at the Bar may be classified under four distinct heads: (1) That the State Legislature was not entitled to enact any provisions under which the property of

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religious institutions was likely to be used or applied for purposes other than the purposes for which the property was intended, such as payment of registration fees the administration charges and the contributions leviable under the Act and in so far as the Charity Commissioner was authorized to submit applications before the Courts or to require that applications be submitted by the trustees for application of the fund *cy-pres* for purposes other than the purposes for which the funds were normally applied, the fundamental rights vested in the citizens and other persons residing within the State were infringed. (2) That the provisions which require accounts to be maintained in the form approved by the Charity Commissioner, and which are required to be inspected, and which prohibit alienations of immoveable property of religious trusts without the sanction of the Charity Commissioner, and which confer a right of access to religious properties upon the Charity Commissioner and his subordinate officers who may be persons professing religious beliefs other than the beliefs of the persons who are interested in the religious trusts, amount to interference with the management of the affairs of religious denominations and infringe fundamental rights vested in the citizens and others. (3) That the exercise of powers conferred upon the Charity Commissioner and his subordinate officers which include a power to direct even the ceremonial observances of religious trusts is likely to interfere with the religious beliefs of the denomination interested in the trust especially if the officer professes religious beliefs different from those of the denomination; and consequently the provision which enables the Charity Commissioner to exercise the same powers as other trustees, is void, as infringing the fundamental rights of the denomination. (4) A levy of contribution from the funds of trusts amounts to a tax not falling within the competence of the State Legislature, and, therefore, the provision which enables contributions to be levied and a fund to be created out of the contribution so levied, together with the charges for the registration of the trust, is *ultra vires* the State Legislature. The first three grounds on which the provisions of the Act have been challenged were sought to be founded on arts. 25 and 26 of the Constitution. The fourth ground raised questions relating to the legislative competence of the State Legislature. It was contended on the first three grounds

that the provisions which it was claimed infringe the right of religious freedom and the right to manage the religious affairs, are void by reason of art. 13 (2) read with arts. 25 and 26 of the Constitution, and on the fourth ground it was contended that the provision which enables contributions to be levied from trusts is beyond the competence of the State Legislature.

Now, by arts. 25 and 26, which fall within Chapter III of the Constitution of India, rights to freedom of religion are conferred. Under art. 25, subject to public order, morality and health, freedom of conscience and the right freely to profess, practice and propagate religion are conferred upon all persons, whether they be citizens or other persons. But that freedom of religion is, by sub-cl. (2) of art. 25, made subject to any legislation enacted for regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practices. It is also made subject to the provision for providing social welfare and reform or for throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus. Under art. 26 there are conferred upon religious denominations or sections of religious denominations rights to establish and maintain institutions for religious and charitable purposes and also the right to manage their own affairs in matters of religion and to own and acquire movable and immoveable property, and to administer such property in accordance with law. The sub-head of Chapter III in which Articles 25 and 26 occur deals with the right to freedom of religion.

The expression "religion" as used in the Constitution is not defined in the Constitution, nor in the General Clauses Act which is made applicable to the construction of the Constitution. In the very nature of things it would be extremely difficult if not impossible to define the expression "religion" or "matters of religion." Essentially religion is a matter of personal faith and belief, or personal relation of an individual with what he regards as his Maker or his Creator or the higher agency which he believes regulates the existence of sentient beings and the forces of the Universe. Again, in view of the fact that there is not one religion but there are numerous religions and different persons residing within this country and within this State profess different religious faiths which seek to identify religion with what may in substance be mere facets of religion, it would be difficult to devise a definition which

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would be regarded as applicable to all religions or matters of religion. To one class of persons mere dogma or beliefs or doctrines may be predominant in the matter of religion; to others rituals or ceremonies may be a predominant facet of religion; and to another class of persons a code of conduct or a mode of life may constitute religion. It may be that even to different persons professing the same religious faith these aspects of religion may have varying significance. What may be regarded as religion by one person or one set of persons may not be regarded necessarily as religion by another person or another class of persons. But this is not an argument of despair. It may not be possible to devise a precise definition of universal application as to what is religion or what are matters of religion but that is far from saying that it is not possible to state with reasonable certainty the limits within which the Constitution conferred a right freely to profess religion or to practice religion or propagate religion, or to what extent the Constitution sought to protect the right to manage the affairs of religious denominations in matters of religion. The question again is not of abstract considerations of the limit of freedom of religion conferred by arts. 25 and 26, but is whether the provisions of the impugned statute infringe the right to those freedoms. Article 25 has conferred upon the citizens and others residing within the State freedom to profess, practise and propagate religion. That is subject to the legislative power of the State Legislature to legislate so as to regulate or restrict the activity of any person which may be associated with religious practices. The right therefore, which is conferred under art. 25 is not an absolute or unfettered right of freedom of professing or practising or propagating religion, but it is subject to legislation by the State limiting or regulating any activity, economic, financial, political or secular associated with religious practice. Similarly that right is also subject to the social welfare and reform legislation of the State. Therefore art. 25 while conferring a right upon the citizens and others freely to profess, practice and propagate their religion does not confer upon the citizens and others an unfettered right to carry on economic, financial, political or secular activities associated with religious practices, nor does it prevent the State from passing any legislation for purposes of social welfare and reform, even though such legislation might directly or indirectly be inconsistent with the religious beliefs of some of the religious denominations. Similarly, even though under art. 26 a right is con-

ferred upon religious denominations or sections thereof to establish and maintain institutions and to manage their affairs in matters of religion, art. 26 enables religious denominations to establish and maintain institutions for religious and charitable purposes. It also confers a right of management of the affairs of the institutions established for religious and charitable purposes. Again, it enables the institutions to acquire and own movable and immovable properties and confers a right to administer those properties. But it is to be noted that the right of management of religious and charitable institutions which is conferred is not an unfettered right of management generally but it is only a right of management in matters of religion. The right of management again is of the denomination or section thereof and is limited to matters of religion, or, in other words, to matters of religious faith and to matters of religious belief. In matters of management of the property of any institution even if it be religious institution, the right of management or administration is by cl. (*d*) of art. 26 subject to the law of the land. There is no right conferred upon the religious denominations to administer their properties otherwise than in accordance with law. Therefore in the administration of property belonging to any religious denomination any attempt to exercise the right of administration of property otherwise than in accordance with the law of the land cannot be protected by art. 26 of the Constitution. There is nothing, either in art. 26 or any other provision of the Constitution to which we have been referred, which makes the provisions of any law of the land relating to the administration of property, even of religious denominations, void.

Before dealing with the provisions of the Act which have been challenged, it is necessary to make two observations, which have a bearing on a majority of the contentions advanced at the Bar. The first is that in deciding upon the constitutionality of any statute the question has to be decided not upon considerations of inconvenience or upon considerations of sentiment, but upon the consideration whether any particular statute is inconsistent with the fundamental freedoms which have been conferred upon the citizens and others or whether it travels beyond the legislative competence of the legislature which has passed the statute which is impugned; and the second observation which must be made is that the protection afforded by the Constitution to fundamental rights is against executive, or legislative interference. A decision of

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a regularly constituted Court cannot however be challenged as an interference with the fundamental rights in the abstract. The Court in the very nature of things adjudicates upon conflicting claims and declares the rights and does not by the operation of its own order seek to infringe any fundamental rights. What may appear to be an interference with a right by an adjudication of a Court is in substance a direction founded on the non-existence in the circumstances of the particular case of the right claimed. A provision of a Statute, which authorises the Courts to adjudicate upon claims which may affect rights, therefore cannot be challenged on the ground that it infringes fundamental rights. It is necessary to bear in mind these observations in deciding upon the validity of the arguments advanced at the Bar.

Under the first head of the arguments (I am not referring to the sections in the sequence in which they were mentioned at the Bar) it was contended that ss. 18, 31, 66, 55, 56, 48, 58 and 50 (*e*) and 50 (*g*) were void. It was urged that s. 18 of the Act XXIX of 1950 which requires every public trust to be registered and s. 66 which penalises the non-compliance with that provision, and s. 31 which imposes a further disability preventing the Courts from enforcing the right of public trusts which have not been registered and which even prevents a claim by way of a set off or other proceedings to enforce the right of such public trusts being entertained, are inconsistent with the provisions of arts. 25 and 26 of the Constitution. But a provision which makes it obligatory to register religious and charitable trusts and imposes penalties for failure to register cannot ex facie be regarded as invalid. Undoubtedly the statute requires a fee to be paid for the registration of a trust. Merely because as a result of the provision making registration obligatory, a part of the funds of a trust, even if it is a religious trust, are likely to be used for purposes strictly other than the purposes of the trust, the provision cannot be regarded as infringing any fundamental right. A provision which enables a fee to be levied for providing more effective control to be maintained on the management of the affairs of a trust would in my view be regarded as a provision ministering to the purposes of the trust, and therefore, the fee paid must be regarded as a payment for the purposes of the trust. Section 48 which contemplates the levy of administrative charges of the Charity Commissioner when that officer is appointed a trustee of any

public trust; and s. 58 which imposes a liability to pay a contribution for carrying into effect the provisions of the Act; and s. 56 which authorizes the Court to direct the application *cy-pres* to any other religious or charitable object if the Court is of the opinion that it is not expedient, practicable, desirable or necessary in the public interest to give effect to the original intention of the author of the trust, or the object for which the public trust was created, are claimed to be void as interfering with the right to religious practice and profession of individuals, and also as interfering with the right of religious denominations to manage the matters of their religion. Prima facie those provisions deal with the use of property and do not directly violate any religious belief or tenet of any religion. But Mr. Somayya on behalf of the petitioner in Civil Application No. 880 of 1952 urges that it is of the essence of the Jain religion, which religion the petitioner in that application professes, that all property which belongs to Jain religious trust is regarded as 'Dev Dravya' or consecreted property, and any application of that property even for payment of registration charges or for payment of administrative charges or for payment of contribution under s. 58, is regarded as contrary to the religious tenets of the Jain religion. Counsel also urges that in so far as under the provisions of s. 56 of the Trust Act, under an order of the Court on an application made under s. 55, the funds of the trust may be applied if the Court thinks it expedient, practicable, desirable or necessary in the public interest to apply the funds or the income of the fund, *cy-pres* to any other religious or charitable object, the fundamental rights conferred upon his client by arts. 25 and 26 are likely to be infringed. Similarly, Counsel submitted that the compliance with the provisions of s. 58 for levying a contribution in such manner as may be prescribed by the rules made under the Act, would be an application or diversion of fund for purposes other than the purpose of the trust and therefore would be inconsistent with the religious tenets or beliefs of the persons professing the Jain religion. It was strenuously contended before us that once property becomes 'Dev Dravya' human ownership therein is destroyed by reason of its dedication to religious uses and it can never be applied consistently with the religious beliefs of the Jains to any secular purpose, and payment of registration charges and payment of contribution and utilization of the property even under the orders of the Court under s. 56 would be inconsis-

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tent with the very incidents of consecreted property and therefore would violate the tenets of the religion which the petitioner professes and could infringe the right of management in matter of religion of the Jain community to which he belongs. Even assuming that the hypothesis on which Mr. Somayya's argument is based is correct (on which no opinion is expressed) there is, in my view no substance in that contention. If the freedom of religion and the freedom in matters of religion conferred by arts. 25 and 26 are confined merely to profession, practice and propagation of religion, and to the right to manage affairs religious such as worship ritual and ceremonial etc. and in administering the property the denomination or the trustees thereof are required to act in accordance with the law of the land, whatever may be the beliefs of any particular denomination or section thereof relating to the manner in which that property should be utilized or maintained, there is no infringement of any fundamental right to profess or propagate any religion, conferred upon any individual by art. 25 of the Constitution, or of any fundamental right of management of the affairs of religion of any denomination under art. 26 of the Constitution. Article 26 of the Constitution in terms requires religious denominations to administer their property consistently with the law of the land and if the law of the land requires that the property shall be applied for payment of charges for registration or payment of contribution, and provides that the property is liable to be utilized *cy-pres* in event of change of circumstances for purposes other than the purposes for which it was originally intended, it cannot be said that there is anything in that law which violates the guarantee of freedom of religion embodied in art. 26 so as to render that law void. Again in the application of the fund of trusts *cy-pres* it is obvious that there is no power conferred upon the Charity Commissioner or any other executive officer under his own fiat or direction to apply the funds for purposes other than the purposes of the trust. When it is regarded as necessary, practicable, expedient or desirable that funds belonging to a public trust should be utilized for other religious or charitable purposes, it is open to the Charity Commissioner under s. 55 to require the trustees to make an application to a competent Court, and in the event of the trustees failing to apply, himself to make an application to the Court for a direction to apply the fund *cy-pres*, and the Court is entitled to direct the application of the fund *cy-pres* to purposes other than the purposes for

which the fund was originally intended. It is true that in enacting the provision of s. 56 of the Act, the legislature has considerably extended the recognized scope of what has come to be known as the doctrine of *cy-pres*. But it cannot be denied that the legislature has the authority in enacting legislation relating to 'charities' and charitable institutions, charitable and religious endowments and religious institutions to extend the scope of application of funds *cy-pres*. If the legislation relating to administration of funds of religious institutions cannot be regarded as inconsistent with the fundamental right to manage the affairs of a denomination in matters of religion, it is difficult to understand how a provision for enabling Courts to direct administration of funds of an institution of a religious denomination in the manner provided can be regarded as infringing any fundamental right to a member of that denomination. The provision imposing liability for payment of administrative expenses on the trusts in the management of the Charity Commissioner, and the application of the funds in satisfaction of that liability cannot for the same reasons be regarded as infringing any fundamental rights. Any disability imposed upon unregistered trusts and the penalty for failure to register cannot conceivably be regarded as infringing any fundamental right, and none was mentioned at the Bar in that connection. It is difficult to appreciate how a provision which requires a suit for reliefs of the nature mentioned in s. 50 to be filed in the manner prescribed therein, infringes the freedom of religion; and the decision of a Court awarding those reliefs cannot for reasons already set out earlier be challenged as infringing any fundamental right.

In my view, therefore, there is nothing in ss. 18, 55, 56, 48, and 58 and 50 (*e*) and 50 (*g*) of the Act which infringes any fundamental rights conferred upon the petitioners.

Under the second head of the argument it was sought to be contended that interference was contemplated by certain provisions of the Act with the administration of their own affairs by religions communities and on this part of the argument both Mr. Somayya on behalf of the petitioner in Petition No. 880 of 1952 and Sir Jamshedji Kanga on behalf of the petitioners in Mis. No. 212 of 1952, who are the trustees of the Parsi Panchayat of Bombay, sought to argue that when accounts are required to be kept in the form approved by the Charity Commissioner and they are required to be maintained

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in a particular form, audits are required to be made, and funds are required to be invested in particular securities, and alienations of immovable property cannot be effected without the sanction of the Charity Commissioner, and the right of access to property belonging to religious trusts is conferred upon the Charity Commissioner and his subordinates, there is in substance an interference with the administration of the religious affairs of the Jain and Parsi communities to which the petitioner in petition No. 880 of 1952 and the petitioners in Mis. No. 212 of 1952 respectively belong.

The sections which are challenged on the second head, viz., interference with the administration of religious affairs of communities, are ss. 32, 34, 35, 36, 37 and 68 (*d*).

Section 32 provides that every trustee of a public trust which has been registered under the Act shall keep regular accounts, and such accounts must be kept in the form approved by the Charity Commissioner and should contain particulars as may be prescribed by rules. It is difficult to understand how a provision which requires accounts to be maintained regularly and in the form prescribed by the Charity Commissioner interferes with the matters of religion of any community.

Section 34 (*1*) of the Act imposes a duty upon every auditor who audits accounts of a public trust under s. 33 to prepare a balance sheet and income and expenditure accounts and to forward a copy of the same to the Deputy or Assistant Charity Commissioner of the region or the sub-region or to the Charity Commissioner, if the Charity Commissioner requires him to do so, and under sub-s. (*2*) of s. 34 the auditor is required in the balance sheet and in his report to specify all cases of irregular, illegal or improper expenditure, or failure or omission to recover moneys or other property belonging to the public trust or of loss or waste of money or other property thereof and to state whether such expenditure, failure, omission, loss or waste was caused in consequence of a breach of trust, or misapplication or any other misconduct on the part of the trustees, or any other person.

Sub-s. (*1*) of s. 34 merely imposes a duty upon the auditor auditing the accounts of a public trust to carry out certain specified duties and to report cases of irregular, illegal or im-

proper expenditure, or failure or omission to recover moneys or other property belonging to the trust. The duty is imposed upon auditors auditing the accounts of a public trust to carry out their duties conscientiously so as to enable the Charity Commissioner to effectually exercise the powers conferred upon him by the Act, but it cannot be said that there is any attempt to interfere with matters of religion or profession of religion by any person. It has not been contended before us, as obviously it could not be contended, that any religious system justifies misappropriation or misapplication or waste of trust funds, and that a duty imposed upon auditors to disclose failure or omission to recover moneys or other property belonging to a trust amounts to interference with the affairs religious of that community.

Section 35 of the Act requires that the trust fund which consist of moneys and which cannot be applied immediately or at any early date to the purpose of the public trust shall be invested by the trustees in public securities. There again it cannot be said that there is any direct interference with any matter of religion. It was however contended by Mr. Somayya on behalf of the petitioner in petition No. 880 of 1952 that it is a tenet of the Jain religion that any funds belonging to a religious institution of that community can only be applied for repairs or maintenance or construction of temple and cannot be utilized for any other purposes. But if, as stated earlier, in considering the first branch of the arguments that the administration of the trust property is to be carried on according to the law of the land as provided in art. 26. cl. (d) of the Constitution, the statute which imposes a duty upon the trustee to invest funds belonging to the trust in public securities can equally not be said to amount to an interference with matters religious of the community.

Section 36 prohibits sale, mortgage, exchange or gift of any immovable property and lease for a period exceeding ten years in the case of agricultural land and for a period exceeding three years in the case of non-agricultural land or a building subject to the directions in the instrument of trust without the previous sanction of the Charity Commissioner. Property belonging to a trust is by that provision sought to be protected from alienations by trustees till a competent officer appointed in that behalf has examined the necessity of the alienation;

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and it would be difficult to accept that by making a provision of that nature the legislature sought to interfere with any matter of religion. Even the religious beliefs that funds belonging to a public trust may not be invested otherwise than in a particular manner, cannot justify the contention that by prohibition without sanction of the Charity Commissioner, of sale, mortgage, exchange or gift of any immovable property or lease for a substantial number of years any interference in matters of religion of any denomination is intended.

Section 37 of the Act falls under Chapter VI; sub-s. (*a*) of that section authorizes the Charity Commissioner, the Deputy or Assistant Charity Commissioner or any officer authorised by the State Government to enter on and inspect or cause to be entered on and inspected any property belonging to a public trust. By s. 68, sub-s. (*d*) that authority is limited in its exercise to the region or sub-region for which the officer is appointed.

It was strenuously contended both by Mr. Somayya and Sir Jamshedji Kanga that this amounted to a serious interference with matters religious of the community. It was contended that in the exercise of the power conferred under s. 37, cl. (*a*) it would be open to the Charity Commissioner who may profess religious beliefs inconsistent with the beliefs of the denomination by which a particular religious institution is maintained or established and that officer may exercise his power of entering or inspecting or causing to be entered upon and inspected any property belonging to a public trust in a manner which may be regarded as a sacrilege. Now the power with which the Charity Commissioner is invested under the section is a power which is not limited in its exercise to the Charity Commissioner, but in terms sub-cl. (*a*) provides that the Charity Commissioner or his subordinates or any officer authorized by the State Government may enter upon and inspect or cause to be entered upon and inspected any property belonging to a public trust. The principal provision is followed by a provision which states that in entering upon any property belonging to a public trust, the officers making the entry shall give reasonable notice to the trustee and shall have due regard to the religious practices or usages of the trust. Normally, a public officer upon whom is conferred the power of entering upon and inspecting or causing to be entered upon and inspected properties belonging to religious trusts would be

expected not to do any act which would reasonably be regarded as a sacrilege in the eyes of persons belonging to any particular religious faith. But the legislature has not merely relied upon what may be regarded as the good sense of the officers while entering and inspecting or causing to be entered upon and inspected any property belonging to a public trust, but has expressly provided that in entering upon any property belonging to a public trust the officers making the entry shall give reasonable notice to the trustees and shall have due regard to the religious practices or usages of the trust. It was contended by Counsel for the petitioners that the proviso only means that the officer in exercising his absolute authority to enter upon property of a religious trust should have regard to religious practices and usages of the trust. But I am unable to accept the contention. In my view the proviso means that before exercising his authority to enter upon any property of a religious trust the officer concerned shall consider whether his entry is consistent with the religious practices and usages of the trust to which it belongs. If according to the religious practices and usages of the religious institution the entry upon any particular property of the institution is regarded as a sacrilege or is regarded as so inconsistent with the beliefs of the persons accustomed to resort to the institution as amounting to a violation of the religion or as wounding their religious susceptibilities the Officer is by the proviso prevented from exercising the right of entry and inspection of the trust property. In such circumstances he has the power, as stated in sub-cl. (*a*) to cause to be entered and inspected any property of a public trust, and he would take steps to authorize some person belonging to that religious persuasion to which the institution belongs so as to carry out inspection or the entry which would be necessary for the purpose of exercising the control under s. 37. In my view there is no substance in the second branch of the arguments.

Then it was contended under the third branch of the argument that according to the religious tenets of certain faiths the trustees of a religious institution must belong to the community which professes the religion of the institution, and that it would be contrary to the religious tenets of that faith if any person other than the person professing that faith is appointed a trustee of the institution. That argument was sought to be supported on the ground that a trustee of a charitable institution is not merely concerned with the secular side of the institution but is concerned to direct the ceremonial and rituals of

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the institution, and in doing so he would not be able to exercise his authority as a trustee unless he belongs to and has faith in the religious beliefs of the institution of which he is a trustee; and on that ground ss. 44 and 47 of the Act were sought to be challenged.

Section 44 authorizes a Court of competent jurisdiction to appoint the Charity Commissioner as a trustee or the author of the trust to appoint the Charity Commissioner a trustee of a trust. If the author of a public trust endows a religious institution and he seeks to appoint the Charity Commissioner as a trustee of that institution, it is still open to the Charity Commissioner to decline absolutely or to accept on such conditions as he may choose to impose. So far as the Court is concerned, the Court in the exercise of its jurisdiction to appoint the Charity Commissioner as a trustee of any public trust, is required by sub-s. (4) of s. 47 to have regard to the wishes of the author of the trust, to the wishes of the person, if any, empowered to appoint a new trustee, to the question whether the appointment will promote or impede the execution of the trust, to the interest of the public or the section of the public who have interest in the trust, and to the custom and usage of the trust. Apart therefore from the question whether any claim to the protection of any fundamental right against the adjudication of a Court, can be entertained, it is apparent that the legislature has sought to make detailed provisions as to the manner in which the jurisdiction of the Court will be exercised when the Charity Commissioner is to be appointed a trustee of a public trust. The Court is required to have regard amongst other things to the custom and usage of the trust and to the question whether the appointment will promote or impede the execution of the trust; and when the Court is exercising its jurisdiction it may not be expected to do any act which is likely to be regarded as a sacrilege of a religious institution. In any case the provision which enables the Courts to appoint trustees, and in certain events a Charity Commissioner as a trustee cannot be regarded as interference with matters of religion. The whole scheme of the Act as indicated by the diverse sections of the Act is to make provision for the effective control over the administration of funds belonging to public trusts and to compel effective performance of the duties by the persons who are in charge of the management of public trusts. It may be that in certain exceptional cases contemplated by ss. 44 and

47 the Charity Commissioner may have to be appointed a trustee of a public trust by the Court, but even in making the appointment the legislature has expressly directed the Court to have regard to the considerations, which I have set out earlier. In my view the contention is raised on grounds of sentiment and not on the ground of constitutionality.

Sections 62, 63, 64 and 65 of the Act were also challenged on the ground that they constituted a violation of freedom of religion. Under those sections it is open to the Deputy or Assistant Commissioner to prepare a list of persons liable to serve as assessors who are to be summoned for assisting the Charity Commissioner, the Deputy Commissioner or the Assistant Commissioner in the performance of certain duties. Even for that purpose as a matter of abundant caution the legislature has provided under s. 65, sub-s. (*1*) that in any enquiry relating to a public trust which is for the benefit of the members belonging to a particular religious denomination, the assessors chosen shall, as far as may be practicable, belong to that religious denomination. A glance at s. 64 is sufficient to convince that the enquiries which are contemplated to be made with the assistance of assessors are enquiries which relate to matters secular, and not religious. Under sub-s. (*a*) of s. 64 in an enquiry for the registration of a public trust or in an enquiry regarding a change in any of the particulars relating thereto the assistance of assessors may be obtained. Similarly under sub-cl. (*b*) of s. 64 in an enquiry regarding any of the public trusts registered under any of the Acts specified in the Schedule to the Act (which are repealed by the Act), the assistance of assessors may be obtained. Similarly under cl. (*c*) and (*d*) of s. 64 in enquiries regarding loss caused in consequence of the acts and conduct of a trustee or of other person or in other enquiries which by rules or by general or special orders made by the State Government in that behalf may be held, the assessors may be required to assist and advise the Charity Commissioner. Sub-cls. (*a*), (*b*) and (*c*) of s. 64 in terms deal with matters relating to the registration of trusts, to the distribution of property or to changes in the particulars thereof. Even under sub-cl. (*d*) the enquiry would be one in which by rules or a general or a special order made by the State Government in that behalf the assessors may be required merely to assist. There is nothing in the Act which might conceivably support the contention that the assistance by the assessors interferes with the freedom of religion. Even in matters which are

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essentially secular the legislature has thought it necessary to provide that persons belonging to the religious denomination to which the institution belongs in respect of which an enquiry is to be made should as far as practicable be associated for assistance to the Charity Commissioner. It is difficult to see how any interference in matters of religion is contemplated by the appointment of assessors and from the assistance rendered by them to the Charity Commissioner in making enquiries contemplated under the Act. On that view the various sections which I have referred to cannot be regarded in any manner as contravening the provisions of arts. 25 or 26 of the Constitution of India.

On the fourth branch of the argument it was contended that under s. 58 it was compulsory for every public trust to pay to the Public Trusts Administration Fund annually such contribution on such date and in such manner as may be prescribed; and by proviso to s. 58 the contribution prescribed is required to be fixed at rates proportionate to the gross annual income of the public trust. It was contended that this was an imposition of a tax which was not within the competence of the State Legislature. Undoubtedly it is not open to the Bombay Legislature under the Constitution to impose a tax other than a tax mentioned in Lists II and III of the Seventh Schedule of the Constitution; and a tax for maintaining a Public Trusts Administration Fund or for the maintenance or control over charities or charitable institutions is not within the competence of the State legislature. But the question that arises is whether the contribution which is levied under s. 58 is a contribution or is a fee within the meaning of item 47 of the Third List of the Seventh Schedule of the Constitution.

Under s. 57 of the Act, constitution of a Public Trusts Administration Fund is authorized; and that fund is to consist of the fees and administrative charges leviable for registration of trusts of the administration and expenses of trusts managed by the Charity Commissioner, of contributions made under s. 58; of the amounts from the funds or the portion thereof which may be credited to the fund as belonging to any public trust or class of public trusts registered under the previous Acts which are repealed of amounts received from private persons or amounts allotted by the State Government or any local authority; and any other sum which may be directed to be credited by or under the provisions of the Act. By the

operative part of s. 57 all these amounts, whether they be contributions or gifts or amounts which are collected as registration fees or administrative charges or the amounts which had become part of the Public Trusts Administration Fund as belonging to public trusts registered under the provisions of previous Acts, are vested in the Charity Commissioner. Those amounts do not form part of the general revenues of the State but vest in the Charity Commissioner. By s. 60 the application of the Public Trusts Administration Fund is directed to be made for payment of charges for expenses incidental to the regulation of public trusts and generally for carrying into effect the provisions of the Act. It is further provided by sub-s. (2) of s. 60 that the custody and investment of the moneys to be credited to the Public Trusts Administration Fund and the disbursement and payment therefrom shall be regulated and made in the manner prescribed, that is prescribed by the rules made under the Act. The amounts collected under various sections of the Act are received and form part of the Public Trusts Administration Fund and do not form part of the general revenues of the State and the Fund remains vested in the Charity Commissioner, and the application of the Fund is defined by Statute to be for specified purposes, viz., payment of charges for expenses incidental to the regulation of Public Trusts and generally for carrying into effect the provisions of the Act, and the custody, investment of the Fund, and the disbursement thereof are to be according to rules prescribed under the Act. It is therefore clear that the contributions collected under s. 58 are to be utilized for forming a fund distinct from the general revenues of the State, and earmarked for specific purposes; and disbursements from which are to be effected, not in the manner in which the general revenues may be disbursed, but in the manner prescribed by the rules made under the Act. These incidents of the levy of contribution indicate that it is a fee and not a tax. It is true that under s. 6A the pay and allowances of the officers appointed to administer the Fund are to be drawn from the Consolidated Fund of the State and the conditions of service of such officers are such as may be determined by the State Government. But that is a provision made only for the purpose of facilitating the administration and not with a view to mix up the Fund with the general revenues collected for Governmental purposes. Section 6B provides that out of the Public Trusts Administration Fund costs which the State Government may determine on

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account of pay, pension, leave and other allowances of the Charity Commissioner, the Deputy and Assistant Charity Commissioners, the Inspectors and other subordinate officers and servants appointed under the Act shall be paid. The liability of meeting the expenses of the administration therefore is of the Public Trusts Administration Fund, and not of the State Government. The mere fact that the State Government initially pays the charges and then reimburses itself for the payment made does not alter the character of the Fund, nor does it operate so as to mix it up with the general revenues of the State.

The Constitution has recognized a distinction between imposts which are regarded as taxes and imposts which are regarded as fees. Under the various items under the Legislative Lists authority is conferred upon the Union Legislature to impose taxes in respect of diverse matters; and also authority is conferred to make provision for levy of fees for the matters specified in those lists; see item 96 of the First List, item 66 of the Second List, and item 47 of the Third List. Under art. 277 of the Constitution also the distinction between taxes, cesses or fees appears to have been recognized. Sometimes in its ordinary connotation the expression 'tax' is used in statutes, in its etymological sense so as to include all levies which are collected by the State or by public corporations whether the levies be earmarked for defined purposes or for general governmental purposes. But in the Constitution the expression 'tax' appears to have been used in a limited sense, i.e., of an impost by the Union or the State Government for general governmental purposes and not in the sense of an impost for defraying the expenses of particular services rendered or to be rendered by the Union or State and earmarked for application for those purposes. Therefore, a levy imposed for defraying the expenses of a particular service and earmarked for the application for the purpose of the service would be regarded as a fee and not a tax.

It was urged that the levy of a contribution under s. 58 has all the indicia of a tax as recognized generally and under the provisions of the Constitution. It was submitted that the levy of contributions is compulsory, that it bears no proportion to the value of the service to be rendered, but is based on the capacity to pay of the party to be taxed and is based on a uniform percentage of the income of the party on whom it is levied. In my view the test for distinguishing between a tax and a fee is not whether the levy is compulsory, nor whether it is

an amount which varies with the capacity of a party required to pay, nor whether the party obtains a benefit commensurate with the amount paid by him, but the test is whether in providing the service for which the levy is collected by the State, the State levies an amount approximating to the expenses for providing the service and disburses it for supplying that particular service. If the total levy bears a just and true relation to the cost of providing the service and the levy is not mixed up with the general revenues of the State, then in my view it would be regarded as a fee and not a tax.

It was suggested that even though a separate fund was constituted and it was provided by s. 60 that the fund shall be disbursed in the manner prescribed thereunder, it was a mere camouflage and an attempt was made to collect the contribution and apply it for the general governmental purposes. This contention was not expressly raised either in petition No. 880 of 1952 or in Misc. No. 212 of 1952. It is true that the statute has not fixed any percentage of the levy and has left it to be fixed by the State Government under the rules to be framed under the Act; but if the Legislature has enacted an Act under which the Fund is constituted and that Fund is vested in the Charity Commissioner apart from the general revenues of the State and there is a direction given that the fund will be applied for specified purposes and disbursement thereof is to be according to the rules as framed under the Act then all the indicia of a fee are present in that levy, and unless there is a clear indication in the Act that in providing for the constitution of the Fund and the application thereof the Legislature was merely providing for a scheme which was wholly unreal, and that the fund was in substance intended to be applied to general governmental purposes and not for purposes for which the Act states it is to be applied, the contention that the provision was a mere comouflage must be rejected.

It was suggested by Counsel for the Parsi Panchayat of Bombay in Misc. No. 212 of 1952 that the Panchayat does not stand in need of services of the Charity Commissioner that their funds are managed efficiently and with scrupulous honesty, and for the imposition of services which are not required by them they are required to pay an amount which bears no relation to the value of the services which would be actually rendered to them. The argument in my view loses sight of the essential character of a fee. A fee is not a payment in the nature of price paid for buying an article or remuneration for services rendered pursuant to a contract. The fee

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levied is the distributive share of the liability under a scheme for distribution of liability which falls on any person who either claims the services or who obtains the benefit of the services provided by a State, whether or not that person obtains his share of services which he regards in value as equivalent to the amount that he is called upon to pay. There is a distinction—and a well recognized distinction—between what may be regarded as price for services which may be obtained and the levy of a fee. If a compulsory service is provided by the State, all persons who become eligible for the service have to pay for the same according to the rate at which the liability is imposed, provided the total cost of supplying the service bears a just and true relation to the total levy, it is immaterial that the burden of the levy on some persons is not commensurate with the value of the service actually rendered to them. If the elected representatives of the people have thought it necessary to devise a scheme for providing that a certain service should be available to the citizens of the State it is immaterial that a class of citizen does not desire to avail itself of that service or that service does not confer any appreciable benefit upon that class. Once the service is provided for by the State the liability for the distributive share according to the scheme of the distribution must be paid by the citizens on whom it is imposed, and it is no answer to say that they are not getting the benefit of the service, or that others are likely to get a much larger benefit of the service, or that they do not need the benefit of the service provided. Though a fee is levied for supplying a service it is strictly not price paid for obtaining the service, and it is not a recognized incident of 'fee' that it must be equivalent to the value of the service obtained by each individual.

In my view therefore the levy of contributions under s. 58 cannot be regarded as imposing of a tax within the meaning of the Constitution, but must be regarded as levying of a fee, which it is within the competence of the State Legislature to impose and collect in respect of all religious and charitable endowments under the provisions of items 28 and 47 of the Third List of the Seventh Schedule of the Constitution. In that view of the case I agree with the order proposed.

Per Curiam.—Both the petitions dismissed with costs.

Petitions dismissed.

K. B. S.